particular consideration at the hands of the court." Plainly that case was in conformity with the general rule regarding recrimination, and no basis for the radical departure embodied in the recent decision.

In Illinois, desertion and cruelty are grounds for divorce *a vinculo matrimonii*. It has been held by the courts of Illinois that a right of action upon the ground of adultery is not affected by the fact of the plaintiff's previous desertion,[8] or extreme and repeated cruelty.[9] The position taken in this jurisdiction is, however, against the great weight of authority.[10] When other courts have considered matters far more serious than clandestine correspondence, but which were not themselves grounds for divorce, such as neglect of marital obligations,[11] personal violence,[12] and malicious turning wife out of doors,[13] the decisions have been that these did not raise valid defenses of recrimination. The attitude of the courts therefore is plainly to limit the defense of recrimination strictly to facts which themselves would sustain an action for divorce, some courts, as Illinois, going so far as to limit this defense to a charge of moral turpitude equal to that upon which the divorce is being sought; and not as in the Michigan case to allow the slightest misconduct to stand in the way of the relief demanded.

Our century is one which seems to favor a reasonable facility in the obtaining of divorce. It would appear, therefore, that the Michigan court has not only decided contrary to the great weight of authority, but in seizing upon this excuse for refusing the divorce, has also seen fit to exercise its discretion against this modern tendency.

S. B. R.

NEW TRIAL—CONSTITUTIONALITY OF PARTIAL NEW TRIAL ON DAMAGE QUESTION ONLY.—The Constitutionality under the Federal Constitution of a new trial limited to certain issues is considered for the first time in a recent case in the Circuit Court of Appeals for the Third Circuit.[1] The trial judge in a personal injury case had granted a new trial limited to the assessment of damages, which had been inadequate in the first trial. The Circuit Court held that such a partial new trial is in violation of the Seventh Amendment to the United States Constitution, preserving the right of trial by jury in Federal Courts.

[8] Huling v. Huling, 38 Ill. App. 144 (1890).
[9] Hughes v. Hughes, 133 Ill. App. 654 (1907).
[10] Note in 39 L. R. A. (n. s.) 1135.
[11] Cushman v. Cushman, 194 Mass. 38, 79 N. E. 809 (1907).
[12] Bailey v. Bailey, 67 N. H. 402, 29 Atl. 847 (1892).
[13] Ellett v. Ellett, 157 N. C. 161, 72 S. E. 861 (1911).
[14] Blickle v. Higbee, *supra*.

[1] McKeon v. Central Stamping Company, 264 Fed. 385 (U. S. C. C. A. 3rd Circuit, 1920).

In 1906 in a case in the Circuit Court of Appeals for the First Circuit,[2] the Court declared that it "is undoubtedly the rule at common law" that such partial new trials should not be granted. This statement was dictum in that case, however, for the court approved sending that very case back for a new trial on the damage question alone, upon the authority of Rev. Stat. 701, which grants the Supreme Court flexible powers in modifying judgments. The constitutionality of the order made in the case was not considered by the Court.

Although it is true that no cases can be found in the early common law of England where a partial new trial was ordered, yet neither are there early cases which hold such a new trial improper. And several cases strenuously oppose the conclusion reached in the *Farrar* case and in the present case, that the common law rule was opposed to partial new trials.[3] In one of these cases,[4] after a full discussion of the authorities, an order similar to the one in the present case was held constitutional under a provision in the state constitution of Mississippi substantially the same as the Seventh Amendment to the United States Constitution.

Within the last hundred years, the English courts have in many instances approved the ordering of partial new trials.[5] By a rule of court under the present Judicature Act, authority to grant a limited new trial is expressly conferred upon the English courts.[6]

In a large number of American jurisdictions, new trials limited to one question only are ordered by the Court, in some cases by statutory authority (as in the *Farrar* case, *supra*), but generally without special enactment, as a part of the inherent power of the court, where the matter in that question is separable from that in the other issues.[7] A few American cases deny that the Court has authority to limit the issues in granting a new trial.[8] The question seems not to have arisen in Pennsylvania.

The conclusions of the Circuit Court of Appeals in the present case are based on the theory of rigid interpretation of the

[2] Farrar v. Wheeler, 145 Fed. 486, 75 C. C. A. 386 (1906).

[3] Clark v. N. Y., N. H. & H. R. R. Co., 33 R. I. 83, 80 Atl. 406, Ann. Cas. 1913 B. 356; Simmons v. Fish, 210 Mass. 563, 97 N. E. 102, Ann. Cas. 1912 D. 588 annotated; Yazoo & M. V. R. R. Co. v. Scott, 108 Miss. 871, 67 So. 491, L. R. A. 1915 E. 239, annotated.

[4] Yazoo & M. V. R. R. Co. v. Scott, *supra*.

[5] Hutchinson v. Piper, 4 Taunt. 555 (Eng. 1812); Thwaites v. Sainsbury, 7 Bing. 437 (Eng. 1831); Price v. Harris, 10 Bing. 331 (Eng. 1833). See the collection and discussion of these and other similar English cases in Clark v. N. Y., N. H. & H. R. R. Co., cited in footnote 3.

[6] The Annual Practice (1915), page 7131.

[7] Smith v. Whittlesey, 79 Conn. 189, 63 Atl. 1085, 7 Ann. Cas. 114 (1906); Winn v. Columbia Ins. Co., 12 Pick. 279 (Mass. 1831); Ferebee v. Norfolk So. R. Co., 163 N. C. 351, 79 S. E. 685 (affirmed by U. S. Supreme Court in 238 U. S. 269 (1915)); Yazoo & M. V. R. R. Co. v. Scott, *supra*.

[8] Cerny v. Paxton & G. Co., 83 Neb. 88, 119 N. W. 14 (1908); Peed v. Brenneman, 72 Ind. 228; (1880); Long v. Garnett, 45 Texas 400 (1876).

Seventh Amendment, a tendency well illustrated in the United States Supreme Court by three recent cases,[9] all of which condemn as unconstitutional the practice of granting judgment *non obstante veredicto* in the Federal Courts. The argument for a broader construction of the amendment is presented by Justice Hughes in an able dissenting opinion in the first of the three cases mentioned.[10]

The decision in the present case, requiring a second litigation of the entire case when the only error has been on one issue, seems opposed to the desired elimination of waste motion and delay in legal procedure, and not actually in conflict with the Constitution, since on all but the one issue now sent back the parties have obtained the fair trial guaranteed to them by the Constitution.[11]

R. D.

[9] Slocum v. N. Y. Life Ins. Co., 228 U. S. 364 (1912); Pedersen v. D. L. & W. R. R. Co., 229 U. S. 146 (1913); Myers v. Pittsburgh Coal Co., 233 U. S. 184 (1914).

[10] Slocum v. N. Y. Life Ins. Co., *supra.*

[11] Compare the discussion by Justice Doe in Lisbon v. Lyman, 49 N. H. 553 (1870); also the opinion in Simmons v. Fish, cited in footnote 3.